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No. 06-1221

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IN THE

Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO.,
Petitioner,

v.

ELLEN MENDELSOHN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

KAREN R. HARNED
ELIZABETH GAUDIO
NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION
1201 F Street, N.W.
Washington, DC 20004
(202) 406-4443

Attorney for *Amicus Curiae* National Federation of Independent Business Legal Foundation

RAE T. VANN
Counsel of Record
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, DC 20005
(202) 789-8600

Attorneys for *Amici Curiae* Equal Employment Advisory Council and Society for Human Resource Management

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The Equal Employment Advisory Council, the National Federation of Independent Business Legal Foundation and the Society for Human Resource Management respectfully submit this brief *amici curiae*. Letters of consent from both parties have been filed with the Clerk of the Court. The brief urges reversal of the decision below and thus supports the position of Petitioner Sprint/United Management before this Court.[1]

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business Legal Foundation (NFIB Legal Foundation), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small-business advocacy association, with offices in Washington, DC and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill this role as the voice for small business, the NFIB Legal Foundation frequently files *amicus* briefs in cases that will impact small businesses nationwide.

The Society for Human Resource Management (SHRM) is the world's largest professional association devoted to human resource management. SHRM's mission is to serve the needs of HR professionals by providing the most current and comprehensive resources, and to advance the profession by promoting HR's essential, strategic role. Founded in 1948, SHRM represents more than 225,000 individual members in over 125 countries, and has a network of more than 575 affili-

ated chapters in the United States, as well as offices in China and India.

Amici's members are employers or representatives of employers that are subject to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, and other employment-related statutes and regulations. As potential defendants to lawsuits claiming age discrimination under the ADEA, *amici's* members have a direct and ongoing interest in the issue presented before this Court concerning the circumstances under which a trial court must admit, in an individual disparate treatment employment discrimination case, the testimony of non-party witnesses regarding alleged discrimination they, too, suffered at times and by individuals not implicated in the matter being litigated. The Tenth Circuit below, in a divided opinion, ruled the district court committed reversible error by excluding this so-called "me, too" evidence, even though the proffered testimony would come from individuals who are not similarly situated to the plaintiff and thus whose stories of discrimination were irrelevant to whether the plaintiff herself was subjected to unlawful age bias.

Amici have an ongoing interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Because of their significant experience in these matters, *amici* are well-situated to brief this Court on the ramifications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Ellen Mendelsohn was employed by Petitioner Sprint/United Management Company (Sprint) from 1989 until November 2002, when she was laid off as part of a company-wide reduction-in-force (RIF). Pet. App. 2a. Mendelsohn, who worked in Sprint's Business Development Strategy Group, was selected for layoff after her immediate supervisor

assessed her performance as the weakest among her peers within the unit. Pet. 2. Over the course of eighteen months, approximately 15,000 employees were terminated nationwide by Sprint as a result of the RIF. *Id.*

In April 2003, Mendelsohn filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC), claiming her selection for layoff was motivated by age. *Id.* After the EEOC dismissed her charge, Mendelsohn brought an action in the United States District Court for the District of Kansas, alleging disparate treatment discrimination in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* *Id.* Although Mendelsohn initially alleged Sprint had engaged in a pattern and practice of age discrimination, she abandoned that claim well prior to trial. *Id.*

In an effort to bolster her individual discrimination claim, Mendelsohn sought to introduce the testimony of five former Sprint employees who were prepared to testify that they, too, had been subjected to unlawful age bias by Sprint. Pet. App. 2a. Sprint filed a motion *in limine* seeking to exclude the testimony, pointing out that the five former employees were not similarly situated to Mendelsohn, since they all were terminated in layoff decisions made by different supervisors, in different locations, and at different times. Pet. 3. The district court granted Sprint's motion, in part, excluding the testimony of the five former employees, *id.*, and limiting Mendelsohn's evidence to "Sprint employees who are similarly situated to her." Pet. App. 3a. At the conclusion of an eight-day trial, a jury returned a verdict in Sprint's favor. Pet. App. 4a.

Mendelsohn appealed to the Tenth Circuit, which reversed and remanded the case for a new trial. Pet. App. 2a. A divided panel held that the district court committed reversible error by excluding the testimony of the five non-party witnesses, as in its view the evidence was "relevant to Sprint's

discriminatory animus towards older workers." Pet. App. 5a. Mischaracterizing Mendelsohn's claim as one alleging a pattern and practice of discrimination ("plaintiff claims to be a victim of a *company-wide* discriminatory RIF"), Pet. App. 9a, the court found, "[a]ge as a motivation for Sprint's selection of Mendelsohn to the RIF becomes more probable when the fact-finder is allowed to consider evidence of (1) an atmosphere of age discrimination, and (2) Sprint's selection of other older employees to the RIF." Pet. App. 14a (footnote omitted). It thus concluded the testimony of the five non-party witnesses is "logically or reasonably tied to the decision to terminate Mendelsohn." Pet. App. 9a (citation and internal quotation omitted).

Dissenting, Judge Tymkovich would have affirmed the district court's order excluding the "me, too" evidence, not only because "the proffered testimony from other employees failed to satisfy the relevance and prejudice requirements of Rule 403," but also because Mendelsohn "has made no independent showing of a company-wide policy of discrimination." Pet. App. 17a. He remarked that the panel majority's ruling "suggests even the most tangentially relevant and prejudicial testimony by former employees is *per se* admissible." Pet. App. 23a. Thus in his view, the district court did not abuse its discretion in excluding the proffered testimony.

Sprint petitioned this Court for a writ of certiorari, which was granted on June 11, 2007.

SUMMARY OF ARGUMENT

Under the Federal Rules of Evidence, only "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is admissible at trial. Fed. R. Evid. 401. The testimony of nonparty witnesses regarding alleged discrimination they, too, suffered at times and by individuals not implicated in the

matter being litigated – offered to bolster the intentional bias claim of a single individual – simply is not relevant and thus should *never* be allowed as evidence of discrimination.

In the absence of credible evidence of a systemic, pattern and practice of discrimination, the focus in determining whether an individual plaintiff was subjected to unlawful bias must be on the motives, conduct and actions of the actual decision maker, not on whether or not others within an organization unconnected to the challenged employment decision harbor a discriminatory animus. Since the decision below creates a *per se* rule depriving district courts of the discretion to exclude irrelevant testimony offered by non-party witnesses regarding the alleged discriminatory misdeeds of individuals not even tangentially related to the challenged individual employment decision, it is erroneous and should be reversed by this Court.

The Tenth Circuit's decision, by essentially treating remote and unrelated actions of supervisors not responsible for the challenged employment decision as a "common practice," also will undercut employers' ability to maintain decentralized management structures. Creative litigants could easily string together unrelated personnel practices and decisions to form nationwide classes of thousands or millions of employees under the evidentiary rule articulated below. Employers facing such claims may have little choice but to cut their losses through settlement, whether or not they have done anything wrong.

An additional, unfortunate consequence of the decision below is that employment litigation likely will increase in cost, frequency and duration, particularly against large employers who are most vulnerable to claims of "me, too" discrimination. It also is likely to encourage employees to file frivolous lawsuits, knowing they automatically will be permitted to introduce "me, too" testimony to bolster their own allegations of bias. In addition, allowing "me, too"

evidence as proof of discrimination in an individual disparate treatment case puts employers in the untenable position of having to defend each case as if it were alleging a company-wide pattern and practice of discrimination, regardless of whether the actual plaintiff has made, or has laid a sufficient evidentiary foundation for, such a claim.

ARGUMENT

I. THE PROFFERED TESTIMONY OF NON-PARTY WITNESSES THAT THEY, TOO, WERE THE VICTIMS OF AGE DISCRIMINATION IS NOT PROBATIVE OF WHETHER A SINGLE PLAINTIFF WAS SUBJECTED TO INTENTIONAL AGE BIAS WHERE NO PATTERN AND PRACTICE HAS BEEN ALLEGED

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Evidence that is not relevant is inadmissible. Fed. R. Evid. 402.

While evidence of other alleged discriminatory conduct generally is relevant in cases alleging a company-wide pattern and practice of intentional discrimination, it is not probative of potential bias against a single plaintiff claiming she was treated less favorably by the decision maker as a result of her age. As this Court has observed:

> The crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual's claim is the reason for a particular employment decision, while at the liability stage of a pattern-or-practice trial the focus often will

> not be on the individual . . . decisions, but on a pattern of discriminatory decisionmaking.

Price Waterhouse v. Hopkins, 490 U.S. 228, 244 n.10 (1989) (quotations and citations omitted).

In an individual disparate treatment case, the focus of the inquiry thus must be on the motives, conduct and actions of the actual decision maker, not on whether or not others within an organization unconnected to the challenged employment decision harbor a discriminatory animus. "A plaintiff must establish 'some causal relationship' to show 'the significance of [decision makers'] non-contemporaneous statements, or statements made by persons other than the relevant decision maker, to the resolution of the ultimate issue of intentional discrimination.'" *Wittenburg v. American Express Fin. Advisors, Inc.*, 464 F.3d 831, 837 (8th Cir. 2006) (quoting *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 779 (8th Cir. 1995)), *cert. denied*, 127 S. Ct. 2936 (2007); *see also Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1084 (11th Cir. 1990) ("In the context of investigating an individual complaint the most natural focus is upon the source of the complained of discrimination – the employing unity or work unit") (citation omitted). Relevant factors to consider include, among other things, whether the alleged discriminatory conduct or remarks were made by the actual decision maker or by a non-decision maker who influenced the decision, and "whether the statement itself is an exhibition of discriminatory animus or merely an opinion that such animus might exist." *Wittenburg*, 464 F.3d at 837 (quoting *Hutson*).

In this case, Mendelsohn sought to introduce the testimony of five former Sprint employees, all of who had been terminated as part of the company-wide RIF, as evidence that her selection for layoff was motivated by age. Specifically, each former employee would have testified that they, too, were the victims of unlawful age bias, albeit at the hands of different supervisors in different locations and at different times during the course of the RIF. Although none of the witnesses ever

worked with Mendelsohn in the Business Development Strategy Group (and thus were not subject to the same supervisory chain of command), she nevertheless believed their testimony would shed light on whether or not her supervisor, in rating her performance as deficient compared to others within the unit (which motivated the layoff decision) harbored a discriminatory age bias against her.

In *Earley v. Champion International Corp.*, the Eleventh Circuit considered an issue closely related to the one presented in this case regarding whether a district court properly excluded certain evidence in an age discrimination suit. 907 F.2d 1077 (11th Cir. 1990). There, the plaintiffs both were terminated as a result of the elimination of their positions due to a company-wide RIF. The ultimate decision as to which employees would be selected for layoff was made at the local level by each individual's supervisor. *Id.* at 1084. The plaintiffs were chosen, in part, based on their poor work performance. *Id.* at 1084 n.5.

They later sued, alleging age discrimination in violation of the ADEA. In support of their claims, the plaintiffs moved to compel nationwide discovery "about 'the identification of each person responsible for [Champion's] operation, the identification and function of each department, and the number and type of employees in each department and in the Company as a whole, by age for each year since January 1, 1980.'" *Id.* at 1084. The district court denied the motion to compel, and the Eleventh Circuit affirmed, concluding the evidence sought was not relevant to resolution of the plaintiffs' discrimination claims. It observed, "[a] vague possibility that loose and sweeping discovery might turn up something suggesting that the structuring of the RIF was discriminatorily motivated does not show particularized need and likely relevance that would require moving discovery beyond the natural focus of the inquiry." *Id.* at 1085 (citation omitted).

The same most certainly can be said of the "me, too" witness testimony Mendelsohn sought to introduce in this case. The proffered evidence could not provide any insight at all as to the manner in which Mendelsohn was treated or even whether her supervisors harbored any discriminatory animus, since none of the witnesses worked with her or in the same chain of supervision. Indeed, every one of the five witnesses would have testified only about alleged discriminatory statements or conduct of *other* Sprint employees, not those responsible for the decision to select Mendelsohn for layoff.

Furthermore, Mendelsohn long abandoned her pattern and practice claims, and chose to proceed only on an individual basis alleging intentional discrimination. As Judge Tymkovich correctly observed in his dissent:

> Given the size of Sprint, the fact that Mendelsohn found five former employees who believed they were the victims of age discrimination is not meaningful until a specific evidentiary foundation has been laid. The proffer of evidence here is devoid of independent evidence showing that Sprint had company-wide discriminatory policies. Even taking as true Mendelsohn's assertion that these witnesses would provide credible evidence that managers other than [hers] were motivated by discriminatory animus, this does not in and of itself support the conclusion that [Mendelsohn's supervisor] was so motivated.

Pet. App. 20a-21a (footnote omitted). Because the "me, too" testimony Mendelsohn sought to introduce as proof of age bias against her was plainly irrelevant, it properly was excluded by the district court pursuant to Rule 401. And since the decision below creates a *per se* rule depriving district courts of the discretion to exclude irrelevant testimony offered by non-party witnesses regarding the alleged discriminatory misdeeds of individuals not even tangentially related to the challenged individual employment decision, it is erroneous and should be reversed by this Court.

II. A BLANKET RULE ALLOWING ANY AND ALL "ME, TOO" WITNESS TESTIMONY AS PROOF OF INTENTIONAL DISCRIMINATION AGAINST A SINGLE PLAINTIFF WILL UNDULY INTERFERE WITH EMPLOYERS' ABILITY TO DELEGATE DECISION MAKING AUTHORITY TO LOCAL MANAGERS

Many employers have decentralized management structures, in which local managers exercise some independent decision making authority. One of the inherent benefits of local decision making – carried out, of course, under an umbrella of corporate policies and guidelines – is that it leaves to the discretion of local supervisors matters that are likely to most affect their particular units or divisions. Those who are most knowledgeable about the day-to-day functions and needs of a department often are in the best position to make decisions that could immediately affect that department.[2]

Permitting evidence of other discrimination allegedly committed by distant supervisors not even remotely involved in the challenged employment decision could force employers to move from decentralized management structures to systems in which all decisions are implemented pursuant to a rigid, common system of administration. In an age of ever-increasing globalization and market demands, such a bureaucratic approach could place large companies in particular at a competitive disadvantage. Worse, since virtually every employment decision involves some exercise of subjectivity, treating subjective decision making as a common policy – as Mendelsohn sought to do in this case through "me, too" evidence – runs the risk of converting every combination of personnel decisions, no matter how separate and unlinked, into a possible class action. Under the sweeping, *per se*

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[2] It goes without saying that local decisions always should be made in accordance with corporate policies and procedures designed to ensure compliance with applicable laws and regulations.

evidentiary rule adopted by the court below, potential plaintiffs can string together unchallenged conjecture and common practices such as subjective decision making into nationwide classes of thousands or millions of employees.[3] Employers facing such claims may have little choice but to cut their losses through settlement, whether or not they have done anything wrong.

III. THE DECISION BELOW INEVITABLY WILL LEAD TO AN INCREASE IN COSTLY AND PROTRACTED EMPLOYMENT LITIGATION

A foreseeable consequence of the Tenth Circuit's ruling is that employment discrimination litigation will increase, particularly against large employers most vulnerable, simply by virtue of their size, to after-the-fact, "me, too" offers of evidence similar to the testimony Mendelsohn sought to introduce in this case. The decision below also is likely to encourage employees to file frivolous lawsuits, knowing they automatically will be permitted to introduce "me, too" testimony to bolster their own allegations of bias. This is particularly true in the context of reductions in force implemented by large employers, where often several hundred, if not thousand, employees may be affected. In addition, it puts employers in the untenable position of having to defend each case as if it were alleging a company-wide pattern and practice of discrimination, regardless of whether the actual plaintiff has made, or has laid a sufficient evidentiary foundation for, such a claim.

In other words, a plaintiff bringing a discrimination lawsuit against an employer, particularly a large employer, likely will have little difficulty finding at least a few other people who

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[3] This is not just a speculative argument. *See Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007) (certifying two million member class alleging sex discrimination based on "common practice" of subjective decision making).

are willing to testify, "Me too." The panel majority decision essentially holds that a trial court *must* allow these individuals to testify without any showing that they are "similarly situated" to the plaintiff, to wit, are in the same protected class, worked at some point for the same company, and lost their jobs under the same general circumstances. *See Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 302 (5th Cir. 2000) ("This court and others have held that testimony from former employees who had different supervisors than the plaintiff, who worked in different parts of the employer's company, or whose terminations were removed in time . . . cannot be probative of whether age was a determinative factor in the plaintiff's discharge") (citations and footnote omitted). In a company with tens of thousands, perhaps hundreds of thousands of employees, the odds of some individuals meeting these vague criteria are very, very high.

Employers must be permitted to operate without the constant pressure that flows from the uncertainty over whether they will have to defend past employment decisions at some unknown point in the future. Permitting irrelevant "me, too" evidence of other discrimination effectively would *require* employers to reach back and defend actions and decisions taken months earlier, so as not to cause the fact finder, in the words of the Tenth Circuit, "to raise an eyebrow" to the true motives behind the employment action actually being litigated.[4] Indeed:

> Had the Court permitted each of the proposed witnesses to testify about the circumstances surrounding his own

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[4] Improper admission of this type of evidence surely would interfere with an employer's substantive rights, as it likely would affect the outcome of the litigation. *See Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 157 (6th Cir. 1988) ("If one cannot say, with fair assurance, . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected") (quoting *Jordan v. Medley*, 711 F.2d 211 (D.C. Cir. 1983)).

> layoff, each, in essence, would have presented a prima facie case of age discrimination. Defendants then would have been placed in the position of either presenting the justification for each witness's layoff, or of allowing the testimony to stand unrebutted. This latter alternative, of course, would have had an obvious prejudicial impact on the jury's consideration of [the plaintiff's] case. To have pursued the former option, defendants would have been forced, in effect, to try all six cases together with the attendant confusion and prejudice inherent in that situation.

Moorhouse v. Boeing Co., 501 F. Supp. 390, 393 (E.D. Pa.), *aff'd mem.*, 639 F.2d 774 (3d Cir. 1980); *see also Schrand*, 851 F.2d at 156 (The non-party testimony of other discrimination "embellished the circumstantial evidence directed to [whether the plaintiff was terminated due to age] by adding 'smoking gun' type evidence. It offered an emotional element that was otherwise lacking as a basis for a verdict in [plaintiff's] favor").

Furthermore, federal public policy favors providing potential defendants to age discrimination claims with prompt notice of an alleged violation. The ADEA, for instance, requires plaintiffs, prior to filing suit in federal court, to file an administrative charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) within the applicable limitations period. 29 U.S.C. § 626(d). This statute of limitations serves the dual purpose of providing respondents with prompt notice of the claim and also giving the EEOC an opportunity to informally resolve the dispute through voluntary means. *Id.* As this Court recently observed in *Ledbetter v. Goodyear*, "[s]tatutes of limitations serve a policy of repose," which "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." 550 U.S. ___, 127 S. Ct. 2162,

2170 (2007) (quotations and citations omitted). They are "designed to assure fairness to defendants" and to "'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965).

Evidence pertaining to other, "me, too" allegations of discrimination likely will never have previously been brought to the defendant-employer's attention. Allowing its introduction will lead to longer, more costly trials, which is a result clearly at odds with the strong public policy favoring prompt notice and informal resolution of claims in lieu of protracted litigation.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

KAREN R. HARNED
ELIZABETH GAUDIO
NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION
1201 F Street, N.W.
Washington, DC 20004
(202) 406-4443

Attorney for *Amicus Curiae* National Federation of Independent Business Legal Foundation

RAE T. VANN
Counsel of Record
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, DC 20005
(202) 789-8600

Attorneys for *Amici Curiae* Equal Employment Advisory Council and Society for Human Resource Management

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